

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2009-007039-001 DT

11/22/2010

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT  
N. Hannahoe  
Deputy

STATE OF ARIZONA

REBEKAH K PRICHARD

v.

DIMITRI ROZENMAN (001)

ULISES FERRAGUT JR.

VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

The Court took defendant's Motion to Vacate Judgment under advisement after evidentiary hearing. The Court has considered the pleadings submitted by both the Defendant and the State, the argument of the parties, and the testimony and exhibits introduced in the evidentiary hearing.

The issue presented is whether the Hawk recording, a digital recording of a February 13, 2009 meeting between defendant and confidential informant Levi Nejar, was properly disclosed and, if not, whether the failure to properly disclose Exhibit 207 necessitates a new trial.

Exhibit 207 is a digital download of a recording made by an ADS device sold only to law enforcement. It can be downloaded only through the use of proprietary Hawk software contained on the disc and made available only to law enforcement.

This Court attempted to listen to the copy of Exhibit 207 made by the defense expert and was unable to do so because the court lacks access to the proprietary Hawk software contained on the disc. The defense expert provided a CD containing wave file converted from Exhibit 207 using

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the proprietary software contained on the disc (Item 3B in the Stutchman report), and the court was able to listen to the Hawk recording as provided in Exhibit 3B of the Stutchman report.

Defendant argues that the court should vacate the defendant's conviction for Conspiracy to Commit First Degree Murder because the failure to disclose the Hawk recording constituted a Brady violation, and because the Stutchman Report and Hawk recording provide newly discovered material facts supporting the motion to vacate judgment under the standards set forth in Rule 32.1 Ariz.R.Crim.P.

Prior to trial, on November 18, 2009, the State provided the defense with a CD marked Audio Video Master. The Audio Video Master contained 3 items; (1) 3GP video file containing audio, (2) short audio clip, and (3) audio only recording made by a receiver carried by Det. Carody, technical surveillance detective for the City of Phoenix, from a signal transmitted by body wire worn by Levi Nejar. The State did not provide the defense with a copy of the Hawk recording marked as Exhibit 207 at trial prior to the trial or during the trial. The State attempted to have Exhibit 207 admitted at trial during the testimony of Det. Warner. The defense objected because Exhibit 207 had not been disclosed. Exhibit 207 was not admitted at trial and was retained by the Clerk of the Court for purpose of appeal.

The State concedes that it at all times prior to and during trial it always insisted that there were only two recordings of the audio-video surveillance of defendant and informant Levi Najar and that those recordings had been disclosed. After trial, in response to post trial motions, it disclosed that there was a third recording. The assigned trial attorney did not know of the existence of the third recording until after the trial was completed and until after defendant was sentenced, but instead relied on the representations that were made to her by Detectives Carmody and Warner that there were only two recordings. She never listened to a copy of the Hawk recording marked as Exhibit 207 until after the trial and sentencing were over.

Because Phoenix Police Department officers outfitted Levi Nejar with three devices, a key fob audio video recorder in 3GP format, the ADS recorder, and a body wire transmitter, and made a recording of the transmittal of the body wire worn by Levi Nejar on a receiver carried by Det. Carmody, the officers knew at the time that there were three separate devices and three separate recordings. When Det. Carmody downloaded the devices, he did not follow his usual practice of downloading each device onto a separate CD. Instead he downloaded the 3GP audio video recording and the transmission received from the body wire transmitter onto one disc and downloaded the Hawk onto what was offered at trial and preserved for appellate purposes as Trial Exhibit 207, a CD marked Hawk.

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Det. Warner, the case agent, testified at trial that there were only two recordings of the meeting between defendant and Levi Nejar. Pretrial, he failed to determine after repeated requests to do so that there was also a third recording and to inform the State's attorney, the court or the defendant that there were, in fact, three recordings.

Prior to trial the State disclosed a video CD that shows detectives placing 3 listening devices on Levi Nejar—two recording devices and a body wire transmitter concealed in a bandana. (Exhibit 14 admitted at Evidentiary Hearing) The police report details that Levi Nejar was outfitted with two recording devices and a transmitter. Levi Nejar disclosed in an interview that there were three devices. (Exhibit G, Reply to State's Response to Defendant's Motion to Vacate Judgment) Trial Exhibit 208 contains language stating that a transmitter had been activated. Defense counsel argued to the court on February 8, 2010 that there were three devices. The defense made attempts on more than one occasion to determine the number of recordings of the meeting and filed a Motion to Compel to receive copies of all recordings.

The existence and impounding of the Hawk recording was disclosed in Supplement 20 of the Phoenix Police Departmental Report. (Exhibit B, State's Response to Defendant's Motion to Vacate Judgment). Supplements 18-23 were disclosed to the defense on December 18, 2009. (Exhibit A, State's Response to Defendant's Motion to Vacate Judgment). In addition, the Hawk recording was made available to the defense attorney at the Phoenix Police Department Property Management Bureau at 100 East Elwood in Phoenix, Arizona on January 7, 2010 when it was checked out on that date. (Exhibit D, State's Response to Defendant's Motion to Vacate Judgment)

In his interview with Det. Carmody, the defense attorney referred to Supplement 20. He questioned Detective Carmody about the Hawk recording in pretrial interviews. In the course of the interview, he was told that there was an audio recording made at the time Levi Nejar met with Dimitri Rozenman on February 13, 2009 which Det. Carmody monitored contemporaneously to insure safety of Levi Nejar. He testified that there was also as an audio-video recording. During the course of that interview, the State's attorney told the defense attorney that he should have both recordings on one disc. At a later point in the interview, Detective Carmody stated that the Hawk CD was a download of the audio device and the other disc was a download of the audio-visual device. He testified that the CD was marked Hawk because that was the type of device used to record. (Exhibit G, State's Response to Defendant's Motion to Vacate Judgment, Interview of Det. Carmody, February 2, 2010).

In his telephonic interview on February 10, 2010, Det. Warner, the case agent, testified that there were two recording devices and that they were activated the whole time and that he impounded two recordings. He testified that the CD marked Hawk was an audio recording of the

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conversation between Levi Nejar and defendant. He testified that the disc marked 451C is the audio-video recording of the conversation between Levi Nejar and defendant. (Exhibit H, State's Response to Defendant's Motion to Vacate Judgment, Interview of Det. Warner, February 10, 2010, 9:12-10:6)

The defense attorney did not ask for a copy of the CD marked Hawk, and did not bring the fact that the State had not provided him with a copy of the CD marked Hawk to the attention of either counsel for the State or the court before or during trial until he objected to its admission on grounds of nondisclosure.

Det. Warner testified at the evidentiary hearing that he provided Jack Mitchell, the State's expert, with a copy of the Hawk recording. Jack Mitchell based his expert testimony on the 3GP 2/13/09 audio/video recording admitted in trial as Exhibit 208. (Exhibit 25, Report of Computer Audio Engineering admitted at Evidentiary Hearing)

In his testimony at the evidentiary hearing and in his report, defense expert Gregg Stutchman opined that the State's expert, Jack Mitchell over amplified and distorted some speech fragments in preparing Isolation from Video files and that distorted what was actually said on the 3GP audio/video recording.

Gregg Stutchman testified that the Hawk recording was a better quality recording because it did not rely on compression technology as did the 2/13/09 3GP audio/video recording admitted at trial as part of Exhibit 208 and played for the jury. Det. Carmody of the Phoenix Police Department also testified at the evidentiary hearing that the Hawk recording is of superior quality to the other recordings made of the surveillance.

The Court, too, has listened to both the Hawk recording and the audio from the 2/13/09 3GP audio/video recording and finds the quality of the Hawk recording to be superior to the quality of the 2/13/09 3GP audio/video recording. Portions of dialog indecipherable on the 3GP recording are audible and comprehensible on the Hawk recording even without expert enhancement.

The Court has listened to both the 3GP audio/video recording and the Hawk recording many times in preparing this ruling. The court also sat through pretrial hearings and the entire trial.

Assertion That Conviction Obtained in Violation of the United States or Arizona Constitutions or

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Was a Brady Violation

Defendant asserts that his conviction was obtained in violation of the United States or Arizona Constitutions.

The defense repeatedly sought information about a third recording that it believed to exist. The State's attorney did not know that there was a third recording, and repeatedly insisted that there were only two recordings based on representations made to her by Detectives Warner and Carmody. She is charged with the knowledge the detectives should have had regarding the number of recordings made of the 2/13/2009 between defendant and Levi Nejar.

The recording did exist and was of superior quality to the recording played at trial as part of Exhibit 208. Though it was inadvertent, material evidence was not disclosed.

The State argues that the Hawk recording was not exculpatory as required by Brady.

The requirement for a Brady violation is not that the evidence be exculpatory, but rather whether in the absence of the undisclosed evidence the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 453 115 S.Ct. 1555,1575 (1994).

In this case, although the Hawk recording and the 3GP recording are of the same conversation, the quality of the Hawk recording is superior to the quality of the 3GP recording that was Exhibit 108 played at trial.

The 3GP recording of the conversation (Exhibit 208) was a critical piece of evidence at trial.

It was used by the State's expert in creating evidence used by the State at trial and referred to in its closing argument.

Recordings of meetings and telephone conversations in which defendant took part were crucial evidence used by the State in building its case. The credibility of the testimony of confidential informant Levi Nejar was impacted by his asking alleged victim Jana Rozenman for money after defendant had been arrested and by contradictions in his testimony at various stages of the investigation and during trial.

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If the jury had heard the Hawk recording, they could have concluded that the trial testimony of Det. Warner was not fully informed and that he was mistaken about the number of recordings made of the surveillance

Basing their arguments on the 3GP recording (Exhibit 208), the State and defense advocated different positions as to what defendant actually said at that meeting during their closing arguments.

Jack Mitchell's expert testimony could have been impeached with the Hawk recording.

The Hawk recording is material to the case.

The fact that the Hawk recording was not available to the defense or the jury "undermines confidence in the outcome of the trial."

Assertion That Newly Discovered Material Facts Exist Under the Standards of Rule 32.1

The Defendant argues that the Hawk recording is newly discovered evidence, and that the Stutchman Report provides newly discovered material facts supporting the motion to vacate judgment.

There are five requirements for newly discovered evidence. *State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995). Each must be found in order for the evidence to be considered newly discovered.

The first is that it must have existed before trial but not have been discovered until after trial.

The Hawk recording existed before trial. The Stutchman Report did not exist prior to trial.

The second is that the defense exercised due diligence in securing the newly discovered material facts. In this case, the Hawk CD was disclosed in Supplement 20 of the Phoenix Police Departmental Report. Defense counsel saw the Hawk CD in the Phoenix Police Department Property Management Bureau on January 7, 2010 and did not request or obtain a copy of the Hawk CD then. Defense counsel was aware of the Hawk recording and referred to it in his pretrial interviews with Detectives Carmody and Warner. He was told that there was a Hawk

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recording made of the meeting between Levi Nejar and Dimitri Rozenman. He was also aware of it through the disclosed video of detectives outfitting Levi Nejar with three surveillance devices, through the police report which stated that Levi Nejar had been outfitted with three surveillance devices, through seeing the CD marked "451C Audio (Hawk)" at the Elwood facility but did not obtain a copy of the Hawk recording until after trial.

Both pretrial and during trial, the State repeatedly insisted that that there were only two recordings and that both of those recordings had been disclosed. The State's attorney told the defense that both recordings were included on the disc marked 451C Audio/Visual.

Nothing prevented the defense from hiring an expert witness prior to trial to rebut the anticipated testimony of Jack Mitchell and to review the evidence in the case. Gregg Structman's conclusions regarding Jack Mitchell's report and whether his testing distorted the words on the 3 GP recording could have been obtained with due diligence prior to trial.

Nothing prevented the defense from hiring an expert witness prior to trial to review the disc marked 451C Audio/Video to determine if the Hawk recording was among the recordings on that disc.

Nothing prevented the defense from bringing to the attention of the Court the existence of the disclosed recording showing Levi Nejar being outfitted with two recording devices and a transmitter or the police report referring to three devices.

The third requirement is that the evidence not be simply cumulative or impeaching. Although the Hawk is another copy of the same conversation that is on the Audio Video master, the quality is superior to that of the Audio Video master. There are words and phrases that can be understood on the Hawk recording that are indecipherable on the 3GP recording.

The Hawk recording could have been used to impeach the trial testimony of Det. Warner and the pretrial interview of Det. Carmody and Det. Warner that there were only two recordings of the meeting between Levi Nejar and Defendant. In addition, it could have been used to impeach the testimony of the State's expert witness Jack Mitchell.

Defendant and the State presented differing arguments as to what was actually said during the conversation captured in the Hawk recording in their closing arguments. Both attorneys felt that what was said during the February 13, 2009 conversation between Levi Nejar and defendant was important to their case.

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The fourth requirement is that the evidence is relevant to the case. The Hawk recording contains evidence that is relevant to the case.

The fifth requirement is that the evidence must be such that it would probably have altered the verdict at trial. Defendant did not make any exculpatory statements on the Hawk recording that were not contained on the 3GP audio/video recording. However, it is possible to hear words and phrases on the Hawk recording that were indecipherable on the 3GP recording. Both counsel argued in closing about what defendant said on the 3GP audio/video recording. Defense counsel now wishes to make a slightly different argument about what defendant said based on the contents of the Stutchman Report.

The Court concludes the defense could have obtained a copy of the CD marked "451C Audio (Hawk)" in the exercise of due diligence. The court does not conclude that availability of the Hawk recording would probably have altered the verdict at trial.

Conclusion

The standards for granting a new trial are different for a Brady violation and for newly discovered evidence under Rule 32.1 Ariz.R.Crim.P.

The standard for a Brady violation is a reasonable probability of a different result. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 519, 435, 115 S.Ct. 1555, 1566 (1995).

The standard for granting a new trial because of newly discovered evidence is that the evidence probably would have changed the verdict.

The Court finds that failure to disclose the Hawk recording was a Brady violation because there is a reasonable possibility of a different result at trial and the unavailability of the Hawk recording undermines the Court's confidence in the outcome of the trial.

The court finds that the Hawk recording is not newly discovered evidence that could not have been discovered with due diligence prior to trial. The Court finds that the defense could have hired an expert prior to trial. The court finds that the Hawk recording was not properly disclosed after repeated requests for copies of all recordings and repeated questions about the number of recordings, but that the defense could have obtained a copy in the exercise of due diligence.



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It is unfortunate that the Court was not made aware of the existence of the video and police report disclosing that Levi Nejar was outfitted with two recording devices and a transmitter prior to trial. The State's attorney and Detectives Carmody and Warner should have carefully confirmed the number of recordings made before making erroneous avowals to the Court and defense and in Detective Warner's case testifying at trial that there were only two recordings. The Court does not find that they deliberately attempted to conceal evidence, but instead finds that any lack of disclosure was inadvertent.

Had a Motion to Compel been filed making the Court aware of all the disclosed evidence that Levi Nejar had been outfitted with three devices in the face of the State's continuing insistence that there were only two recordings, the Court would have set the matter for evidentiary hearing prior to trial. This matter should have been resolved prior to trial.

The availability of the Hawk recording would probably not have changed the verdict, although the Court finds that there is a reasonable possibility that the verdict would have been different after impeachment of Det. Warner and Jack Mitchell.

The Court finds that the absence of the best quality recording of the February 13, 2009 meeting between confidential informant Levi Nejar and defendant, a crucial piece of evidence, from trial and the resulting inability of the jury to consider that evidence in weighing the State's case and in judging the credibility of witnesses undermines the Court's confidence in the outcome of this trial. The Court is not confident that the jury's verdict would have been the same had the Hawk recording been available at trial.

Based on the Brady violation and the consequences of that violation,

It is ordered granting Motion to Vacate Judgment based on the Brady violation.

It is ordered denying Motion to Vacate Judgment based on newly discovered evidence meeting the standards set forth in Rule 32.1 Ariz.R.Crim.P.

It is ordered setting this matter for Complex Case Management Conference on December 1, 2010 at 8:30 a.m.

It is ordered that defendant shall be transported from the Department of Corrections to the custody of the Maricopa County Sheriff so that he can be present at the Complex Case Management Conference.

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It is ordered setting new last day as January 21, 2011.

FILED: Exhibit Worksheet.